



Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Allow Companies to List in Connection with a Direct Listing with a Primary Offering In Which the Company Will Sell Shares Itself In the Opening Auction on the First Day of Trading on Nasdaq and to Explain How the Opening Transaction for Such a Listing Will be Effected

May 19, 2021.

I. Introduction

On September 4, 2020, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to allow companies to list in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange and to explain how the opening transaction for such a listing will be effected. The proposed rule change was published for comment in the Federal Register on September 21, 2020.³ On November 4, 2020, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On December 17, 2020, the Commission instituted proceedings

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 89878 (September 15, 2020), 85 FR 59349 (September 21, 2020). Comments received on the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2020-057/srnasdaq2020057.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 90331 (November 4, 2020), 85 FR 71708 (November 10, 2020).

under Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On February 22, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed.⁸ The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on March 2, 2021.⁹ On March 17, 2021, the Commission extended the time period for approving or disapproving the proposal to May 19, 2021.¹⁰ On April 30, 2021, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the proposed

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 90717 (December 17, 2020), 85 FR 84025 (December 23, 2020) (“Order Instituting Proceedings” or “OIP”).

⁸ Amendment No. 1 to the proposed rule change revised the proposal to (1) add to the requirements that must be satisfied before a security can be released for trading in the cross that the actual price calculated by the cross must be at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement; (2) revise the fourth tie-breaker used in calculating the Current Reference Price (as defined below) to provide that this tie-breaker will be the price that is closest to the lowest price of the price range disclosed by the issuer in its effective registration statement; (3) revise the price to be used by Nasdaq for purposes of qualifying a security for listing to provide that Nasdaq will use a price per share equal to the lowest price in the price range disclosed by the issuer in its effective registration statement to determine whether the company has met the applicable Market Value of Unrestricted Publicly Held Shares (as defined below), bid price, and market capitalization requirements; (4) add that, notwithstanding the provisions of Rule 4120(c)(8)(A), Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade as described in Rule 4120(c)(8)(A), and Nasdaq will make the determination of whether to postpone or reschedule the offering, but will do so only if there is insufficient buy interest to satisfy the CDL Order and all other market orders, or if the actual price calculated by the cross is outside the price range established by the issuer in its effective registration statement; and (5) make minor technical changes to improve the clarity of the proposal. Amendment No. 1 to the proposed rule change is available on the Commission’s website at <https://www.sec.gov/comments/sr-nasdaq-2020-057/srnasdaq2020057-8400450-229459.pdf>.

⁹ See Securities Exchange Act Release No. 91205 (February 24, 2021), 86 FR 12245 (March 2, 2021) (“Notice”).

¹⁰ See Securities Exchange Act Release No. 91345 (March 17, 2021), 86 FR 15530 (March 23, 2021).

rule change, as modified by Amendment No. 1.¹¹ The Commission is approving the proposed rule change, as modified by Amendment No. 2.

II. Description of the Proposal, as Modified by Amendment No. 2

Listing Rule IM-5315-1 provides additional listing requirements for listing a company that has not previously had its common equity securities registered under the Exchange Act on the Nasdaq Global Select Market at the time of effectiveness of a registration statement¹² filed solely for the purpose of allowing existing shareholders to sell their shares (a “Selling Shareholder Direct Listing”). To allow a company to also sell shares on its own behalf in connection with its initial listing upon effectiveness of a registration statement, without a traditional underwritten public offering, the Exchange has proposed to adopt Listing Rule IM-5315-2. This proposed rule would allow a company that has not previously had its common equity securities registered under the Exchange Act to list its common equity securities on the Nasdaq Global Select Market at the time of effectiveness of a registration statement pursuant to which the company itself will sell shares in the opening auction on the first day of trading on the Exchange (a “Direct Listing with a Capital Raise”).¹³

¹¹ Amendment No. 2 to the proposed rule change revised the proposal to (1) clarify Nasdaq’s intent in Amendment No. 1 that in a Direct Listing with a Capital Raise, Nasdaq alone would make a determination of whether to postpone and reschedule the offering, and would not postpone and reschedule if (i) all market orders will be executed in the cross, and (ii) the actual price calculated by the cross is at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement; and (2) make minor technical and conforming changes to improve the clarity of the proposal. Because the changes in Amendment No. 2 to the proposed rule change do not materially alter the substance of the proposed rule change or make conforming or technical amendments, Amendment No. 2. is not subject to notice and comment. Amendment No. 2 to the proposed rule change is available on the Commission’s website at <https://www.sec.gov/comments/sr-nasdaq-2020-057/srnasdaq2020057-8746216-237241.pdf>.

¹² The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 (“Securities Act”).

¹³ See proposed Listing Rule IM-5315-2. A Direct Listing with a Capital Raise would include listings where either: (i) only the company itself is selling shares in the opening auction on the first day of trading; or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction. See id. The Commission

In considering a Selling Shareholder Direct Listing, Listing Rule IM-5315-1 currently provides that the Exchange will determine that such company has met the applicable Market Value of Unrestricted Publicly Held Shares¹⁴ requirement based on the lesser of: (i) an independent third-party valuation of the company (a “Valuation”);¹⁵ and (ii) the most recent trading price for the company’s common stock in a Private Placement Market¹⁶ where there has been sustained recent trading. For a security that has not had sustained recent trading in a Private Placement Market prior to listing, the Exchange will determine that such company has met the Market Value of Unrestricted Publicly Held Shares requirement if the company satisfies the applicable Market Value of Unrestricted Publicly Held Shares requirement and provides a Valuation evidencing a Market Value of Publicly Held Shares of at least \$250,000,000.

With respect to a Direct Listing with a Capital Raise, the Exchange has proposed that, in determining whether a company satisfies the Market Value of Unrestricted Publicly Held Shares requirement for initial listing on the Nasdaq Global Select Market, the Exchange will deem such company to have met the applicable requirement if the amount of the company’s Unrestricted

notes that while the Exchange’s current rules also permit Selling Shareholder Direct Listings on the Nasdaq Global Market and Nasdaq Capital Market (see Listing Rules IM-5405-1 and IM-5505-1), the current proposal would only provide for a Direct Listing with a Capital Raise on the Nasdaq Global Select Market.

¹⁴ “Restricted Securities” means securities that are subject to resale restrictions for any reason, including, but not limited to, securities: (1) acquired directly or indirectly from the issuer or an affiliate of the issuer in unregistered offerings such as private placements or Regulation D offerings; (2) acquired through an employee stock benefit plan or as compensation for professional services; (3) acquired in reliance on Regulation S, which cannot be resold within the United States; (4) subject to a lockup agreement or a similar contractual restriction; or (5) considered “restricted securities” under Rule 144. See Listing Rule 5005(a)(37). “Unrestricted Securities” means securities that are not Restricted Securities. See Listing Rule 5005(a)(46). “Unrestricted Publicly Held Shares” means the Publicly Held Shares that are Unrestricted Securities. See Listing Rule 5005(a)(45). See also Listing Rule 5005(a)(23) and (35) for definitions of “Market Value” and “Publicly Held Shares.”

¹⁵ Listing Rule IM-5315-1 describes the requirement for a Valuation, including the experience and independence of the entity providing the Valuation.

¹⁶ The Exchange defines “Private Placement Market” in Listing Rule 5005(a)(34) as a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer.

Publicly Held Shares before the offering, along with the market value of the shares to be sold by the company in the Exchange's opening auction in the Direct Listing with a Capital Raise is at least \$110 million (or \$100 million, if the company has stockholders' equity of at least \$110 million).¹⁷ The Exchange has proposed to calculate the Market Value of Unrestricted Publicly Held Shares, for this purpose, using a price per share equal to the lowest price of the price range disclosed by the issuer in its effective registration statement.¹⁸ The Exchange also proposes to determine whether the company has met the applicable bid price and market capitalization requirements based on the same share price.¹⁹

The Exchange states that, except as proposed for a Direct Listing with a Capital Raise, its listing rules generally do not include shares held by officers, directors, or owners of more than 10% of the company's common stock in calculations of Publicly Held Shares.²⁰ In qualifying companies for listing in a Direct Listing with a Capital Raise, however, all shares sold by the company in the offering and all shares held by public holders prior to the offering will be

¹⁷ See proposed Listing Rule IM-5315-2. See also Listing Rule 5315(f)(2)(A) and (B) (requiring a Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, not in connection with an IPO, of at least \$110 million; or at least \$100 million, if the company has stockholders' equity of at least \$110 million).

¹⁸ See proposed Listing Rule IM-5315-2. The Exchange states that, for example, if the company is selling five million shares in the opening auction and there are 45 million shares issued and outstanding immediately prior to the listing that are eligible for inclusion as Unrestricted Publicly Held Shares based on disclosure in the company's registration statement, then the Exchange would calculate the Market Value of Unrestricted Publicly Held Shares based on a combined total of 50 million shares. If the lowest price of the price range disclosed in the company's registration statement is \$10 per share, the Exchange will attribute to the company a Market Value of Unrestricted Publicly Held Shares of \$500 million, based on a \$10 price per share. See Notice, *supra* note 9, 86 FR 12246 n.15. The Exchange also states that, as described below, the opening auction would not execute at a price that is below the bottom of the disclosed range, so this is the minimum price at which the company could list in connection with a Direct Listing with a Capital Raise. See *id.* at 12246 n.14.

¹⁹ See proposed Listing Rule IM-5315-2.

²⁰ See Notice, *supra* note 9, 86 FR 12246. The Exchange states that these types of inside investors may purchase shares sold by the company in the opening auction, and purchase shares sold by other shareholders or sell their own shares in the opening auction and in trading after the opening auction, to the extent not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. See *id.*

included in the calculation of Publicly Held Shares. According to the Exchange, such investors may acquire in secondary market trades shares sold by the issuer in a Direct Listing with a Capital Raise that were included when calculating whether the issuer met the Market Value of Unrestricted Publicly Held Shares requirement for initial listing.²¹ The Exchange states, however, that a company listing in conjunction with a Direct Listing with a Capital Raise will be required to have a Market Value of Unrestricted Publicly Held Shares that is much higher than the Exchange's \$45 million Market Value of Unrestricted Publicly Held Shares requirement that applies to a traditional underwritten initial public offering ("IPO").²² The Exchange further states that this heightened requirement, along with the ability of all investors to purchase shares in the opening process on the Exchange, should result in companies using a Direct Listing with a Capital Raise having adequate public float and a liquid trading market after the completion of the opening auction.²³

The Exchange also states that it believes that it is consistent with the protection of investors to calculate the security's bid price and values derived from the security's price using a price per share equal to the lowest price of the price range disclosed by the issuer in its effective registration statement.²⁴ The Exchange states that it will allow the opening auction, otherwise

²¹ See Notice, supra note 9, 86 FR 12246. The Exchange states that it expects that a company expecting to sell a significant portion of its shares to officers, directors, and existing significant shareholders would not undertake a public listing through a Direct Listing with a Capital Raise, but rather would raise capital in a private placement or a similar transaction instead. See id. at 12248.

²² See Notice, supra note 9, 86 FR 12246. See also Listing Rule 5315(f)(2)(C) (requiring a Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, in connection with an IPO, of at least \$45 million). The Exchange also states that, unlike a company listing in connection with a Selling Shareholder Direct Listing that could qualify for the price-based initial listing requirements based on a Valuation, a company listing in connection with a Direct Listing with a Capital Raise, like an IPO, must qualify for such requirements based on the minimum price at which it could sell shares in the offering. See id. at 12248.

²³ See Notice, supra note 9, 86 FR 12246.

²⁴ See Notice, supra note 9, 86 FR 12248.

known as the Nasdaq Halt Cross,²⁵ to take place at a price as low as this price, but no lower, and so this is the minimum price at which a company could be listed.²⁶

The Exchange states that any company listing in connection with a Direct Listing with a Capital Raise would continue to be subject to, and required to meet, all other applicable initial listing requirements. According to the Exchange, this would include the requirements to have the applicable number of shareholders and at least 1,250,000 Unrestricted Publicly Held Shares outstanding at the time of initial listing, and the requirement to have a price per share of at least \$4.00 at the time of initial listing.²⁷

In addition, the Exchange has proposed to amend Rule 4702 to add a new order type, the “Company Direct Listing Order” or “CDL Order,” which would be used by the issuer in a Direct Listing with a Capital Raise. This would be a market order entered for the quantity of shares offered by the issuer, as disclosed in an effective registration statement for the offering, that will execute at the price determined in the Nasdaq Halt Cross.²⁸ A CDL Order may be entered only on behalf of the issuer and the CDL Order may not be cancelled or modified. Only one Nasdaq member, representing the issuer, may enter a CDL Order during a Direct Listing with a Capital Raise. The price of the CDL Order would be set in accordance with Rule 4120(c)(9)(B) that requires, among other things, that the CDL Order is executed at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration

²⁵ “Nasdaq Halt Cross” means the process for determining the price at which Eligible Interest shall be executed at the open of trading for a halted security and for executing that Eligible Interest. See Rule 4753(a)(4). “Eligible Interest” means any quotation or any order that has been entered into the system and designated with a time-in-force that would allow the order to be in force at the time of the Halt Cross. See Rule 4753(a)(5). Pursuant to Rule 4120, the Exchange will halt trading in a security that is the subject of an IPO (or direct listing), and terminate that halt when the Exchange releases the security for trading upon certain conditions being met, as discussed further below. See Rule 4120(a)(7) and (c)(8).

²⁶ See Notice, supra note 9, 86 FR 12248.

²⁷ See Notice, supra note 9, 86 FR 12246 (citing Listing Rules 5315(e)(1) and (2) and 5315(f)(1)).

²⁸ See proposed Rule 4702(b)(16)(A) and (B).

statement. The CDL Order must be executed in full at the price determined in the Nasdaq Halt Cross, and all orders priced better than the price determined in the Nasdaq Halt Cross also would need to be satisfied.²⁹

The Exchange has proposed that securities listing in connection with a Direct Listing with a Capital Raise must begin trading on the Exchange following the initial pricing through the Nasdaq Halt Cross, which is described in Rules 4120(c)(9) and 4753.³⁰ As described in detail below, the Exchange has proposed to modify Rule 4120(c)(9) with respect to certain functions that are performed by an underwriter in an IPO or a financial advisor in a Selling Shareholder Direct Listing, to require that in the case of a Direct Listing with a Capital Raise, Nasdaq, in consultation with the financial advisor to the issuer, would make the determination of whether the security is ready to trade and Nasdaq would determine whether to postpone and reschedule the offering as described in Rule 4120(c)(8)(A).³¹ The Exchange states that the requirement that the company begin trading of the company's securities following the initial pricing through the Nasdaq Halt Cross will promote fair and orderly markets by protecting against volatility in the pricing and initial trading of securities covered by the proposal, because a substantial number of

²⁹ See proposed Rule 4702(b)(16)(A); Notice, supra note 9, 86 FR 12247. The Exchange states that the proposed CDL Order is similar in some respects to a limit order because it cannot execute at a price less than the lowest price in the price range disclosed by the issuer in its effective registration statement. The Exchange also states that, as a market order, the CDL Order is guaranteed to execute in the Nasdaq Halt Cross. See Notice, supra note 9, 86 FR 12247 n.20.

³⁰ See proposed Listing Rule IM-5315-2. Rule 4120(c)(9) states that the process for halting and initial pricing of a security that is subject to an IPO is also available for the initial pricing of any other security that has not been listed on a national securities exchange immediately prior to the initial pricing, if a broker-dealer serving in the role of financial advisor to the issuer is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an IPO, and if more than one broker-dealer is serving in the role of financial advisor, the issuer must designate one to perform these functions. The Exchange proposes to renumber this provision as Rule 4120(c)(9)(A). See proposed Rule 4120(c)(9)(A).

³¹ See Amendment No. 2, supra note 11, at 14 n.19. As discussed further below, Nasdaq will postpone the offering only if there is insufficient buy interest to satisfy the CDL Order and all other market orders, or if the actual price calculated by the cross is outside the price range established by the issuer in its effective registration statement.

orders are expected to be executed in the Nasdaq Halt Cross at a single price rather than in the secondary trading at fluctuating prices.³² In addition, the Exchange has proposed to amend Rule 4120(c)(9) to specify that any services provided by such financial advisor to the issuer of a security under Rules 4120(c)(8) and 4120(c)(9)(A) and (B), including a company listing in connection with a Direct Listing with a Capital Raise, must be provided in a manner that is consistent with all federal securities laws, including Regulation M and other anti-manipulation requirements.³³

With respect to the Nasdaq Halt Cross, the Exchange has proposed that, in the case of a Direct Listing with a Capital Raise, a security shall not be released for trading by Nasdaq unless the actual price calculated by the cross is at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement.³⁴ This requirement would be in addition to the existing process described in Rule 4120(c)(8)(A)(i), (ii), and (iii), as modified by the proposed changes to Rule 4120(c)(9).³⁵

Current Rules 4120(c)(8) and (9) provide that the underwriter of the IPO, or the financial advisor in a Selling Shareholder Direct Listing, respectively, provide notice to Nasdaq that the security subject to the Nasdaq Halt Cross is “ready to trade.”³⁶ These rules also provide that the

³² See Notice, supra note 9, 86 FR 12248.

³³ See proposed Rule 4120(c)(9)(A). The Exchange states that this change will also apply to Selling Shareholder Direct Listings under Listing Rules IM-5315-1, IM-5405-1, and IM-5505-1. See Notice, supra note 9, 86 FR 12248.

³⁴ See proposed Rule 4120(c)(9)(B).

³⁵ Rule 4120(c)(8)(A) provides that a security will not be released for trading until (i) Nasdaq receives notice from the underwriter of the IPO or financial advisor in the case of a Selling Shareholder Direct Listing that the security is ready to trade; (ii) the system verifies that all market orders will be executed in the cross; and (iii) the price determined in the cross satisfies a price validation test, in which the actual price of the cross may not deviate from the expected price of the cross that was last displayed to the underwriter or financial advisor by an amount greater than the selected price band of between \$0 and \$0.50.

³⁶ Rule 4120(c)(8)(A)(i) provides that Nasdaq receives notice from the underwriter of the IPO that the security is ready to trade. The Exchanges states that the Nasdaq system will calculate the Current Reference Price at that time and display it to the underwriter. If the

underwriter of the IPO, or the financial advisor in a Selling Shareholder Direct Listing, with concurrence of Nasdaq, may determine at any point during the Nasdaq Halt Cross process up through the conclusion of the pre-launch period to postpone and reschedule the pricing of the security subject to the Nasdaq Halt Cross. The Exchange has proposed to require that in the case of a Direct Listing with a Capital Raise, for purposes of releasing securities for trading on the first day of listing, Nasdaq, in consultation with the financial advisor to the issuer, would make the determination of whether the security is ready to trade.³⁷ Once Nasdaq has determined that the security is ready to trade, Nasdaq shall release the security for trading if (i) all market orders will be executed in the Nasdaq Halt Cross; and (ii) the actual price calculated by the Nasdaq Halt Cross is at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement. Nasdaq shall postpone and reschedule the offering only if either or both such conditions are not met.³⁸

According to the Exchange, if there is insufficient buy interest to satisfy the CDL Order, and all other market orders, as required by the proposal, or if the actual price calculated by the Nasdaq Halt Cross is outside the price range established by the issuer in its effective registration statement, the Nasdaq Halt Cross would not be allowed to proceed and such security would not begin trading.³⁹ The Exchange represents that, if the Nasdaq Halt Cross cannot be conducted

underwriter then approves proceeding, the Nasdaq system will conduct certain validation checks. According to the Exchange, under the proposal, Nasdaq would take over these functions of the underwriter. See Notice, supra note 9, 86 FR 12247 n.23. See also Rule 4853(a)(3) for a description of the “Current Reference Price.”

³⁷ See proposed Rule 4120(c)(9)(B).

³⁸ See proposed Rule 4120(c)(9)(B).

³⁹ See Notice, supra note 9, 86 FR 12247. The Exchange states that Nasdaq alone would make any determination to postpone and reschedule the offering and would do so only in the narrowly defined circumstances described in proposed Rule 4120(c)(9)(B). See Amendment No. 2, supra note 11, at 15 n.19. The Exchange also states that the price bands established by Rule 4120(c)(8) cannot act to cause the Nasdaq Halt Cross to occur outside of the price range disclosed by the issuer in its effective registration statement, because the actual price calculated by the Nasdaq Halt Cross is required to be at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement. See Notice, supra note 9, 86 FR 12248.

because these conditions are not met, the Exchange would postpone and reschedule the offering and notify market participants via a Trader Update that the Direct Listing with a Capital Raise scheduled for that date has been cancelled and any orders for that security that have been entered on the Exchange, including the CDL Order, would be cancelled back to the entering firms.⁴⁰ The Exchange further states that because the CDL Order will be a market order, if the Nasdaq Halt Cross proceeds, that order will execute in full in the Nasdaq Halt Cross, along with orders priced at or better than the price determined in the Nasdaq Halt Cross.

The Exchange states that, unlike in an IPO, a company listing through a Direct Listing with a Capital Raise would not have an underwriter to guarantee that a specified number of shares would be sold by the company at a price consistent with disclosure in the company's effective registration statement. However, the Exchange states that this would be achieved through the proposed requirements that (1) the Nasdaq Halt Cross occur only if the CDL Order, which must be equal to the total number of shares disclosed as being offered by the company in the effective registration statement, is executed in full; and (2) the Nasdaq Halt Cross occur at a price per share that is within the price range disclosed by the issuer in its effective registration statement.⁴¹ The Exchange states that it believes that the CDL Order and related provisions would clearly define the method by which the issuer participates in the opening auction, to prevent the issuer from being in a position to improperly influence the price discovery process, and assures an auction that is consistent with the disclosures in the registration statement.⁴²

⁴⁰ See Notice, supra note 9, 86 FR 12247–48.

⁴¹ See Notice, supra note 9, 86 FR 12249.

⁴² See Notice, supra note 9, 86 FR 12249. The Exchange states that, specifically, the CDL Order entered on the company's behalf could not be executed at a price below the low end or above the high end of the price range in the company's effective registration statement, and, as a market order, the full quantity of shares in the CDL Order would have to be executed in the opening auction. The Exchange states that, in addition, the CDL Order would not be able to be modified and the financial advisor to the company would be unable to reschedule the offering once it began. See id.

Finally, the Exchange has proposed to make adjustments to how it would calculate the Current Reference Price, which is disseminated in the Nasdaq Order Imbalance Indicator,⁴³ and the price at which the Nasdaq Halt Cross would execute, for a Direct Listing with a Capital Raise. In each case, where there are multiple prices that would satisfy the conditions for determining the price, the Exchange would modify the fourth tie-breaker for a Direct Listing with a Capital Raise to use the lowest price of the price range disclosed by the issuer in its effective registration statement.⁴⁴

III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.⁴⁵ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Exchange Act,⁴⁶ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

⁴³ See Rule 4853(a)(3) for a description of the “Order Imbalance Indicator.”

⁴⁴ See proposed Rule 4753(a)(3)(A)(iv)(c) and (b)(2)(D)(iii). The Exchange states that the fourth tie-breaker used to calculate the Current Reference Price for an IPO is the price that is closest to the issuer’s IPO price, and that a Direct Listing with a Capital Raise is similar to an IPO in that the company sells securities in the offering. See Notice, supra note 9, 86 FR 12249. The Exchange also proposes non-substantive changes to renumber the other alternatives for the fourth tie-breaker. See proposed Rule 4753(a)(3)(A)(iv) and (b)(2)(D).

⁴⁵ 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule change’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁴⁶ 15 U.S.C. 78f(b)(5).

The Commission has consistently recognized the importance and significance of national securities exchange listing standards. Among other things, such listing standards help ensure that exchange-listed companies will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.⁴⁷ The standards, collectively, also provide investors and market participants with some level of assurance that the listed company has the resources, policies, and procedures to comply with the requirements of the Exchange Act and Exchange rules.⁴⁸

The Exchange's listing standards currently provide the Exchange with discretion to list a company whose stock has not been previously registered under the Exchange Act, where such

⁴⁷ The Commission has stated in approving national securities exchange listing requirements that the development and enforcement of adequate standards governing the listing of securities on an exchange is an activity of critical importance to the financial markets and the investing public. In addition, once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained. See, e.g., Securities Exchange Act Release Nos. 90768 (December 22, 2020), 85 FR 85807, 85811 n.55 (December 29, 2020) (SR-NYSE-2019-67) ("NYSE 2020 Order"); 82627 (February 2, 2018), 83 FR 5650, 5653 n.53 (February 8, 2018) (SR-NYSE-2017-30) ("NYSE 2018 Order"); 81856 (October 11, 2017), 82 FR 48296, 48298 (October 17, 2017) (SR-NYSE-2017-31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR-NYSE-2017-11). The Commission has stated that adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Exchange Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest. See, e.g., NYSE 2020 Order, 85 FR 85811 n.55; NYSE 2018 Order, 83 FR 5653 n.53; Securities Exchange Act Release Nos. 87648 (December 3, 2019), 84 FR 67308, 67314 n.42 (December 9, 2019) (SR-NASDAQ-2019-059); 88716 (April 21, 2020), 85 FR 23393, 23395 n.22 (April 27, 2020) (SR-NASDAQ-2020-001).

⁴⁸ "Meaningful listing standards are also important given investor expectations regarding the nature of securities that have achieved a national securities exchange listing, and the role of a national securities exchange in overseeing its market and assuring compliance with its listing standards." Securities Exchange Act Release No. 65708 (November 8, 2011), 76 FR 70799, 70802 (November 15, 2011) (SR-NASDAQ-2011-073). See also NYSE 2020 Order, supra note 47, 85 FR 85811 n.56; Securities Exchange Act Release Nos. 65709 (November 8, 2011), 76 FR 70795 (November 15, 2011) (SR-NYSE-2011-38); 88389 (March 16, 2020), 85 FR 16163 (March 20, 2020) (SR-NASDAQ-2019-089). The Exchange, in addition to requiring companies seeking to list to meet the quantitative initial listing standards and once listed the quantitative continued listing standards, also requires listed companies to meet other qualitative requirements. See, e.g., Listing Rules 5600 Series, Corporate Governance Requirements.

company is listing in connection with a Selling Shareholder Direct Listing.⁴⁹ The Exchange has proposed to allow companies to list in connection with a Direct Listing with a Capital Raise, which would provide a company the option, without a firm commitment underwritten offering, of selling shares to raise capital in the opening auction upon initial listing on the Exchange.⁵⁰ The Commission notes that recently it approved a proposal by the New York Stock Exchange to allow a direct listing with a primary offering.⁵¹

As explained further below, the following aspects of the proposal, as modified by Amendment No. 2, demonstrate that it is reasonably designed to be consistent with the protection of investors and the maintenance of fair and orderly markets, as well as the facilitation of capital formation: (i) addition of the CDL Order type and other requirements that address how the issuer will participate in the opening auction; (ii) addition of the requirement that the opening price must occur at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement; (iii) discussion of the role of financial advisors and addition of requirements providing that only Nasdaq, in consultation with the financial advisor, may determine that the security is ready to trade and limiting the circumstances pursuant to which Nasdaq could postpone or reschedule the offering; (iv) addition

⁴⁹ See Nasdaq Listing Rules IM-5315-1, IM-5405-1, and IM-5505-1. See also Securities Exchange Act Release Nos. 85156 (February 15, 2019), 84 FR 5787 (February 22, 2019) (SR-NASDAQ-2019-001) (notice of filing and immediate effectiveness of proposal to adopt listing standards for direct listings on Nasdaq Global Select Market); 87648 (December 3, 2019), 84 FR 67308 (December 9, 2019) (SR-NASDAQ-2019-059) (order granting approval of proposal to adopt requirements for the Nasdaq Capital and Global Markets applicable to direct listings).

⁵⁰ See proposed Listing Rule IM-5315-2. In contrast, Listing Rule IM-5315-1 states that it permits companies “to list on the Nasdaq Global Select Market, provided the Company meets all applicable initial listing requirements and lists at the time of effectiveness of a registration statement filed solely for the purpose of allowing existing shareholders to sell their shares. This Interpretive Material describes when a Company whose stock is not previously registered under the Exchange Act may list on the Nasdaq Global Select Market, where such Company is listing without a related underwritten offering upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements.” Listing Rule IM-5315-1.

⁵¹ See NYSE 2020 Order, supra note 47.

of language reminding financial advisors that specified activities are to be conducted in a manner that is consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements; and (v) clarification of how market value will be determined for qualifying the company's securities for listing.

The Commission discusses below the Exchange's proposal to allow a Direct Listing with a Capital Raise. First, the Commission addresses the Exchange's proposed market value of unrestricted publicly-held shares requirement for a Direct Listing with a Capital Raise. Second, the Commission addresses concerns it raised in the Order Instituting Proceedings about the initial listing opening auction process for Direct Listings with a Capital Raise and the role of financial advisors in the Exchange's proposed rule change, prior to the changes made by Amendment Nos. 1 and 2. As discussed below, in the amended proposal the Exchange made several modifications to its proposal that were designed to address these concerns.⁵² Finally, the Commission addresses a commenter's concerns about whether the proposal is consistent with investor protection and the public interest given the lack of traditional underwriter involvement in a Direct Listing with a Capital Raise and concerns about Securities Act Section 11 liability.⁵³ As discussed throughout this order, the Commission concludes that the Exchange has met its burden to demonstrate that its proposal is consistent with the Exchange Act, and therefore finds the proposed rule change to be consistent with the Exchange Act.

⁵² See supra notes 8 and 11. In the amended filing, the Exchange states that, following approval of this proposed rule change, the Exchange intends to file a separate proposal with the Commission that will seek to modify the process for a Direct Listing with a Capital Raise so that it would operate in a manner similar to the initial proposal, and the Exchange will seek to address the remaining issues raised in the Order Instituting Proceedings. See Notice, supra note 9, 86 FR 12245 n.9. This approval order pertains only to Nasdaq's current proposal before the Commission, and any new rules or changes to the rules being approved would require the Exchange to file a new proposed rule change pursuant to Section 19(b) of the Exchange Act.

⁵³ In addition to the comments discussed below, one commenter stated general support for Nasdaq's proposed method of opening the transaction. See Letter from Rahul Chaudhary (October 13, 2020).

A. Aggregated Market Value of Unrestricted Publicly Held Shares Requirement

The Exchange has proposed that it will deem a company to have met the Market Value of Unrestricted Publicly Held Shares requirement if the amount of the company's Unrestricted Publicly Held Shares before the offering along with the market value of the shares to be sold by the company in the Exchange's opening auction in the Direct Listing with a Capital Raise is at least \$110 million (or \$100 million, if the company has stockholders' equity of at least \$110 million). The Exchange would calculate the Market Value of Unrestricted Publicly Held Shares using a price per share equal to the lowest price of the price range disclosed by the issuer in its effective registration statement.⁵⁴ According to the Exchange, a company may list in connection with a traditional underwritten IPO with a minimum \$45 million Market Value of Unrestricted Publicly Held Shares. The Exchange states that the "heightened requirement" for a Direct Listing with a Capital Raise, "along with the ability of all investors to purchase shares in the opening process on the Exchange, should result in companies using a Direct Listing with a Capital Raise having adequate public float and a liquid trading market after completion of the opening auction."⁵⁵

The Exchange has shown that the proposed aggregate Market Value of Unrestricted Publicly Held Shares requirement provides the Exchange with a reasonable level of assurance that the company's market value supports listing on the Exchange and the maintenance of fair

⁵⁴ See supra notes 17–18 and accompanying text.

⁵⁵ Notice, supra note 9, 86 FR 12248. As described above, in determining that a company has met the Market Value of Unrestricted Publicly Held Shares requirement, the Exchange will consider the market value of all shares sold by the company in the opening auction, rather than excluding shares that may be purchased by officers, directors, or owners of more than 10% of the company's common stock, notwithstanding that generally the Exchange's listing standards exclude shares held by such insiders from its calculations of publicly-held shares. The Exchange states that it expects that a company expecting to sell a significant portion of its shares to these insiders would not undertake a public listing through a Direct Listing with a Capital Raise, but would raise capital in a private placement or similar transaction instead. See id.

and orderly markets.⁵⁶ The Commission reaches this conclusion because the proposed market value standard for listing a Direct Listing with a Capital Raise is more than two times greater than the market value standard that currently exists under Exchange rules for an Exchange listing of an IPO. The proposed requirement is also comparable to the Market Value of Unrestricted Publicly Held Shares requirement used by the Exchange for initial listing in other contexts.⁵⁷ Specifically, the Exchange's proposed Market Value of Unrestricted Publicly Held Shares requirement of at least \$110 million (or \$100 million, if the company has stockholders' equity of at least \$110 million) is the same Market Value of Unrestricted Publicly Held Shares requirement applied to companies that list their primary equity securities on the Exchange, other

⁵⁶ A significant number of exchange-listed IPOs in the recent years had proceeds that fell below the \$110 million threshold. Using information from Thomson Reuters SDC Platinum New Issues database, the Commission staff concluded that, among 146 exchange-listed IPOs conducted during the 2019 calendar year, the median offer size was \$106.7 million. Among 196 exchange-listed IPOs conducted during the 2020 calendar year, the median offer size was \$175.4 million. Further, staff concluded that approximately 51.4 percent of the companies that went public via the IPO in 2019 and 33.7 percent of the companies that went public via the IPO in 2020 (63.6 percent in 2019 and 34.6 percent in 2020 among NASDAQ IPOs only) had an offer size that fell below \$110 million. Similarly, academic research finds that the median proceeds raised in exchange-listed IPOs in the United States were approximately \$121 million during the 2019 calendar year and \$188 million during the 2020 calendar year. See Jay R. Ritter, Initial Public Offerings: Updated Statistics tbl.4f (March 10, 2021), [available at https://site.warrington.ufl.edu/ritter/files/IPO-Statistics.pdf](https://site.warrington.ufl.edu/ritter/files/IPO-Statistics.pdf).

⁵⁷ See supra notes 17 and 22 and accompanying text.

than in the case of an IPO or spin-off,⁵⁸ in addition to being higher than the \$45 million Market Value of Unrestricted Publicly Held Shares requirement applied to IPOs and spin-offs.⁵⁹

Further, as described below, using the lowest price in the price range established by the issuer in its registration statement to determine the minimum market value is a reasonable and conservative approach because the Direct Listing with a Capital Raise will not proceed at a lower price.

B. Opening Auction Process for Direct Listing with a Capital Raise and Role of Financial Advisors

As discussed above, the Exchange has proposed to add the CDL Order as a new order type to be used in a Direct Listing with a Capital Raise. An issuer would be required to submit a CDL Order in the opening auction for the full quantity of offered shares, as reflected in the effective registration statement, and the CDL Order must be executed in full. Although the CDL Order would be entered as a market order, it would only execute at a price at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective

⁵⁸ The existing market value requirement of at least \$110 million (or \$100 million, if the company has a stockholders' equity of at least \$110 million) in Listing Rule 5315(f)(2)(A) and (B) is a longstanding requirement that has supported the listing of companies on the Exchange since 2009. See Securities Exchange Act Release No. 53799 (May 12, 2006), 71 FR 29195 (May 19, 2006) (SR-NASDAQ-2006-007) (creating the Nasdaq Global Select Market and implementing initial listing requirements for that market). In 2019, when approving a proposal by Nasdaq to require that the calculation of market value of publicly-held shares be limited to unrestricted securities, the Commission stated that it believed that the revisions "should help to ensure that the Exchange lists only securities with a sufficient market, with adequate depth and liquidity, and with sufficient investor interest to support an exchange listing." Securities Exchange Act Release No. 86314 (July 5, 2019), 84 FR 33102, 33111 (July 11, 2019) (SR-NASDAQ-2019-009). The Exchange also applies this same market value requirement to Selling Shareholder Direct Listings if the company's security has had sustained recent trading in a Private Placement Market. See Listing Rule IM-5315-1(a); Securities Exchange Act Release No. 85156 (February 15, 2019), 84 FR 5787 (February 22, 2019) (SR-NASDAQ-2019-001).

⁵⁹ The existing \$45 million market value requirement in Listing Rule 5315(f)(2)(C) is a longstanding requirement that has supported the listing of companies on the Exchange that are suitable for listing and has existed since 2010. See Securities Exchange Act Release No. 61904 (April 14, 2010), 75 FR 20651 (April 20, 2010) (SR-NASDAQ-2010-047) (lowering the market value of publicly-held shares requirement for the listing of IPOs, affiliates, or spin-offs from \$70 million to \$45 million).

registration statement. The CDL Order cannot be modified or cancelled by the issuer once entered.⁶⁰

In the Order Instituting Proceedings, the Commission raised concerns about provisions in the original proposal regarding the price at which the Nasdaq Halt Cross could proceed on the first day of trading, and whether that price would be consistent with the disclosures in the issuer's Securities Act registration statement.⁶¹ Specifically, the Commission expressed concern about the lack of a proposed maximum price, above which the cross could not proceed, and that, without an upside limit, it was not clear how the issuer could ensure that the issuer's Securities Act registration statement would cover the full amount of securities to be sold in the offering.⁶² The Commission also expressed concern about a provision in the original proposal that would have allowed the opening cross to occur at a price up to 20% below the price range disclosed by the issuer in its effective registration statement, and that the Exchange had not explained how investors would know the minimum price at which the company could sell shares in the offering.

⁶⁰ See supra notes 28–29 and accompanying text. In addition, as discussed above, the Exchange proposes that it would modify the fourth tie-breaker used for the Current Reference Price disseminated in its Order Imbalance Indicator and for the price at which the Nasdaq Halt Cross will execute to equal the lowest price of the price range reflected in the effective registration statement. See supra notes 43–44 and accompanying text. The Commission believes that this is a reasonable price to use because the auction cannot occur at a lower price.

⁶¹ If that price were not consistent with the disclosures in the issuer's Securities Act registration statement, in addition to any issues under the Securities Act, there would be concerns about whether the proposal was consistent with Section (6)(b)(5) under the Exchange Act, including whether the proposal was designed to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest.

⁶² One commenter stated that it shared this concern. See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (January 13, 2021) ("CII Letter II"). In the Order Instituting Proceedings, the Commission stated, among other things, that although issuers may file additional Securities Act registration statements to register additional securities needed to complete an offering, Section 5 of the Securities Act requires all of the related registration statements to be effective prior to the time of sale. To the extent Nasdaq's original proposal may have resulted in issuers needing to register additional securities beyond those included in an initial Securities Act registration statement, it was not apparent how an issuer could ensure that any additional required registration statement would be effective prior to the time of opening.

Further, the Commission raised a concern that it was unclear from the proposed rules that the cross would not occur at a price that is below the price 20% below the disclosed price range due to the application of an existing provision that permits an underwriter or financial advisor to select price bands of up to \$0.50 outside of the expected cross price and still have the cross proceed if the actual price is within the price band.

In the amended proposal, the Exchange modified the permissible price range for the opening cross and provided that Nasdaq would release a security for trading only if the actual price calculated by the cross is at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement.⁶³ The Commission believes that the changes to the proposed pricing provisions that the Exchange made in the amended proposal ensure that the actual price of the cross and the number of shares offered will be consistent with the issuer's disclosures in its effective registration statement. The Commission further believes that these changes adequately address the Commission's concerns arising from the price at which the cross would proceed.

The CDL Order and related opening auction procedures proposed by the Exchange set forth the method by which the issuer participates in the opening auction, help to prevent the issuer from being in a position to improperly influence the price discovery process,⁶⁴ and will help result in the Exchange conducting an auction that is otherwise consistent with the disclosures in the registration statement. Specifically, the issuer would be required to submit a

⁶³ With respect to the potential use of price bands allowed by Rule 4120(c)(8), the Exchange states that Nasdaq would set the price bands and that it intends to set these price bands at zero. The Exchange further states that the price bands cannot act to allow the cross to occur outside of the price range disclosed by the issuer in its effective registration statement because, under the proposal as amended, the actual price calculated by the cross is required to be at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement. See supra note 39 and accompanying text.

⁶⁴ See supra note 60 and accompanying text. See also proposed Rule 4702(b)(16), which sets forth the requirements the issuer must follow in entering the CDL Order, and proposed Rule 4120(c)(9)(B), which sets forth the requirements for Nasdaq to release the security for trading in the opening auction for a Direct Listing with a Capital Raise.

CDL Order in the opening auction for the full quantity of offered shares, and the security would only be released for trading in the opening auction at a price that is within the disclosed price range, as reflected in the effective registration statement. Further, the CDL Order cannot be modified or cancelled by the issuer once entered. The Commission notes that it recently approved the use of a similar order for the opening process for a direct listing with primary offering on another national securities exchange, stating that an opening process using such order type provided reasonable assurance that the opening auction and subsequent trading promote fair and orderly markets, and that the proposed rules are designed to prevent fraud and manipulation and protect investors and the public interest, consistent with Section 6(b)(5) under the Exchange Act.⁶⁵

In the Order Instituting Proceedings, the Commission also expressed concern that the proposed rules appeared to permit the issuer's financial advisor broad discretion to postpone the offering, which would effectively cancel the CDL Order. In its original proposal, the Exchange contemplated that the financial advisor in a Direct Listing with a Capital Raise would determine when the security is ready to trade, similar to the role played by an underwriter in an IPO or a financial advisor in a Selling Shareholder Direct Listing, and could also postpone the offering at anytime prior to the opening.⁶⁶ In the amended proposal, the Exchange proposed to modify its rules for the opening cross to provide that, for a Direct Listing with a Capital Raise, Nasdaq, in

⁶⁵ See NYSE 2020 Order, supra note 47, 85 FR 85813.

⁶⁶ Under current Rule 4120(c)(8) and (9), a security will be released for trading by the Exchange in its opening cross when the Exchange receives notice from the underwriter in an IPO (or the financial advisor in a Selling Shareholder Direct Listing) that the security is ready to trade and the security passes certain validation checks. Specifically, in the case of an IPO, the underwriter will notify the Exchange that the security is ready to trade. Then the Nasdaq system will calculate the Current Reference Price at the time and display it to the underwriter. If the underwriter approves proceeding, the Nasdaq system will conduct validation checks to determine that all market orders will be executed in the cross and that the actual price calculated by the cross does not differ from the price displayed to the underwriter by an amount in excess of the price band selected by the underwriter. In addition, the underwriter may determine at any point during the cross process to postpone and reschedule the offering. In a Selling Shareholder Direct Listing, a financial advisor performs these functions.

consultation with the financial advisor to the issuer, would make the determination of whether the security is ready to trade, and Nasdaq alone would make the determination of whether to postpone and reschedule the offering, rather than allowing the financial advisor to make these determinations. Nasdaq would postpone and reschedule the offering only if there is insufficient buy interest to satisfy the CDL Order and all other market orders, or if the actual price calculated by the cross is outside the price range established by the issuer in its effective registration statement.

The Commission believes that providing Nasdaq exclusive discretion to determine whether to postpone or reschedule the offering, and limiting that discretion to cases where the CDL Order could not otherwise be executed, adequately addresses the concerns expressed in the Order Instituting Proceedings that the CDL Order, which by its terms may not be cancelled or modified, could indirectly be cancelled by virtue of the financial advisor's broad discretion to postpone or reschedule the offering.⁶⁷ This will help ensure that the offering will proceed consistent with the disclosures in the issuer's Securities Act registration statement and, for the reasons noted above, consistent with Section 6(b)(5) of the Exchange Act.

In addition, the proposed rules contain a reminder to the financial advisor that any activities performed under Rules 4120(c)(8) and 4120(c)(9)(A) and (B) must be conducted in a manner that is consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements.⁶⁸ This provision will help to ensure compliance by participants in the direct listing process with these important provisions of the federal securities laws and that the proposed changes are consistent with preventing manipulative acts and practices, and protecting investors and the public interest in accordance with Section 6(b)(5) of the Exchange Act.

⁶⁷ See supra notes 38–39 and accompanying text.

⁶⁸ See proposed Rule 4120(c)(9)(A).

C. Lack of Traditional Underwriter Involvement in a Direct Listing with a Capital Raise and Securities Act Section 11 Standing

One commenter recommended that the Commission disapprove the proposal because it believes that the proposed expansion of direct listings would compound problems that shareholders face in tracing their share purchases to a registration statement for purposes of claims under Section 11 of the Securities Act and may lead to a decline in effective corporate governance at U.S. public companies.⁶⁹ This commenter stated that traceability concerns often arise when there have been successive offerings, as shareholders seek to establish their standing to litigate claims for material misstatements or omissions under Section 11 of the Securities Act.⁷⁰ The commenter also stated that investor concerns about the traceability of shares in a direct listing were drawn into sharp focus in current litigation involving a direct listing by Slack Technologies, Inc. (“Slack”), which is still under judicial review.⁷¹ The commenter further

⁶⁹ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, at 2, 4 (October 8, 2020) (“CII Letter I”); CII Letter II, supra note 62. The commenter stated that on September 25, 2020, the Commission issued an order granting the Council of Institutional Investors’ petition for review of an order, issued by delegated authority, granting approval of a proposed rule change by the New York Stock Exchange LLC relating to a proposed direct listing with a primary offering (“NYSE Proposal”). See CII Letter I, at 1–2. This commenter stated that the Exchange’s current proposal is similar to the NYSE Proposal and cites its petition for review of the NYSE Proposal as further support for its recommendation that the Commission disapprove Nasdaq’s proposal. See id. at 1–2 (citing Petition of Council of Institutional Investors for Review of an Order, Issued by Delegated Authority, Granting Approval of a Proposed Rule (September 8, 2020), available at <https://www.sec.gov/rules/sro/nyse/2020/34-89684-petition.pdf>). See also NYSE 2020 Order, supra note 47 (setting aside previous approval by delegated authority and approving proposed rule change).

⁷⁰ See CII Letter I, supra note 69, at 2–3. The commenter cited to a statement by Commissioners Lee and Crenshaw, issued contemporaneously with the Commission’s approval of the NYSE Proposal, that raised a concern about the potential inability of shareholders to recover losses for inaccurate disclosures due to traceability problems. See CII Letter II, supra note 62, at 3.

⁷¹ See CII Letter I, supra note 69, at 3. In that case, as noted by the commenter, the defendants sought dismissal of the Section 11 claims on the grounds that the plaintiffs could not trace their purchases to Slack’s registration statement. The commenter stated with respect to this case that while the district court denied the motion to dismiss the Section 11 claims, it is uncertain whether the Ninth Circuit Court of Appeals, which has agreed to consider the Section 11 standing issue on an interlocutory basis, will uphold the district court’s reasoning. See id. See also Pirani v. Slack Technologies, Inc., No. 20-16419 (9th Cir. July 23, 2020), Docket No. 1.

stated that, independent of the Slack case, direct listings raise important investor issues that the Commission should consider before opening U.S. capital markets up to the potential for a vastly increased number of direct listings.⁷² The commenter urged the Commission to explore updating its “proxy plumbing” regulations before approving an expanded direct listings regime.⁷³ In response, the Exchange stated that the Commission has previously considered these concerns and stated that the Commission determined that investor protection concerns relating to tracing challenges are not unique to direct listings.⁷⁴

In addition, this commenter stated that it is concerned that the Exchange’s proposal would result in a significant increase in the use of direct listings, and that more direct listings may lead to a decline in the effective corporate governance of U.S. public companies to the detriment of long-term investors and the capital markets generally.⁷⁵ The commenter stated that a recent direct listing of Palantir Technologies Inc. had a multi-class structure that is viewed by many market participants as inconsistent with effective governance.⁷⁶ In response, the Exchange stated that it believes that the concern about a decline in effective corporate governance is unsubstantiated and challenges in this context are not of such magnitude as to render the proposal inconsistent with the Exchange Act. The Exchange also pointed to the Commission’s prior conclusion that it did not view a firm commitment underwriting as necessary to provide adequate investor protection in the context of a registered offering.⁷⁷

⁷² See CII Letter I, supra note 69, at 3.

⁷³ See CII Letter I, supra note 69, at 4.

⁷⁴ See Notice, supra note 9, 86 FR 12249 (citing NYSE 2020 Order, supra note 47, 85 FR 85816).

⁷⁵ See CII Letter I, supra note 69, at 4.

⁷⁶ See CII Letter I, supra note 69, at 5. See also CII Letter II, supra note 62, at 3 (raising a concern about the lack of a firm commitment underwriter).

⁷⁷ See Notice, supra note 9, 86 FR 12250 (citing NYSE 2020 Order, supra note 47, 85 FR 85815).

As the Commission stated previously, the Securities Act does not require the involvement of an underwriter in registered offerings.⁷⁸ Moreover, given the broad definition of “underwriter”⁷⁹ in the Securities Act, a financial advisor to an issuer engaged in a Direct Listing with a Capital Raise may, depending on the facts and circumstances including the nature and extent of the financial advisor’s activities, be deemed a statutory “underwriter” with respect to the securities offering, with attendant underwriter liabilities.⁸⁰ Thus, the financial advisors to issuers in Direct Listings with a Capital Raise have incentives to engage in robust due diligence, given their reputational interests and potential liability, including as statutory underwriters under the broad definition of that term.⁸¹ Moreover, even absent the involvement of a statutory underwriter, investors would not be precluded from pursuing any claims they may have under the Securities Act for false or misleading offering documents, nor would the absence of a statutory underwriter affect the amount of damages investors may be entitled to recover.

⁷⁸ See, e.g., Item 508(c) of Regulation S-K (“Outline briefly the plan of distribution of any securities to be registered that are to be offered otherwise than through underwriters.”). See also NYSE 2020 Order, *supra* note 47, 85 FR 85815.

⁷⁹ Section 2(a)(11) of the Securities Act defines “underwriter” to include “any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates, or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking.” For purposes of this definition, “issuer” includes, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

⁸⁰ Whether a person would be considered a statutory underwriter would be evaluated based on the particular facts and circumstances, in light of the definition of underwriter contained in Section 2(a)(11). See, e.g., *SEC v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072 (9th Cir. 2010); *Harden v. Raffensperger, Hughes & Co.*, 65 F.3d 1392 (7th Cir. 1995); *SEC v. Int’l Chem. Dev. Corp.*, 469 F.2d 20 (10th Cir. 1972); *SEC v. Chinese Consol. Benevolent Ass’n*, 120 F.2d 738 (2d Cir.), *cert. denied*, 314 U.S. 618 (1941).

⁸¹ Depending on the facts and circumstances, an analysis of activities engaged in by financial advisors in the context of selling shareholder direct listings could lead to a conclusion that such advisors are statutory underwriters. The Commission understands that practices surrounding direct listings continue to evolve. The Commission will continue to monitor such activities and any developments, and will evaluate whether further action in this area would be appropriate.

In addition, issuers, officers, directors, and accountants, with their attendant liability, play important roles in assuring that disclosures provided to investors are materially accurate and complete. The Commission therefore does not view a firm commitment underwriting as necessary to provide adequate investor protection in the context of a registered offering. Indeed, exchange-listed companies often engage in offerings that do not involve a firm commitment underwriting.

Moreover, as the Commission stated previously, the commenter's concerns regarding shareholders' ability to pursue claims pursuant to Section 11 of the Securities Act due to traceability issues are not exclusive to nor necessarily inherent in a direct listing with a primary offering, including the proposed Direct Listing with a Capital Raise.⁸² Rather, this issue is potentially implicated anytime securities that are not the subject of a recently effective registration statement trade in the same market as those that are so subject. Where a registration statement, at the time of effectiveness, contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, Section 11(a) of the Securities Act provides a cause of action to "any person acquiring such security," unless it is proved that at the time of the acquisition the person "knew of such untruth or omission."⁸³ In the context of conventional public offerings, courts have interpreted this statutory provision to permit aftermarket purchasers (i.e., those who acquire their securities in secondary market transactions rather than in the initial distribution from the issuer or underwriter) to recover damages under Section 11, but only if they can trace the acquired shares back to the offering covered by the false or misleading registration statement.⁸⁴ Tracing is not set forth in Section 11 and is a judicially-developed doctrine. The application of this doctrine and, in particular, the pleading standards and factual proof that potential claimants must satisfy

⁸² See NYSE 2020 Order, *supra* note 47, 85 FR 85815.

⁸³ Section 11(a) of the Securities Act.

⁸⁴ See, e.g., *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013).

vary depending on the particular facts of the distribution and judicial district, and may be affected by pending litigation.⁸⁵

Although it is possible that aftermarket purchases following a Direct Listing with a Capital Raise may present tracing challenges, it is not yet known whether a court would find that this investor protection concern is applicable to a Direct Listing with a Capital Raise. We expect judicial precedent on traceability in the direct listing context to continue to evolve,⁸⁶ but the Commission is not aware of any precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims. The Commission is actively monitoring this issue and will be able to respond to such concerns when and if they arise.

With respect to the commenter's concern that Nasdaq's proposal could lead to a significantly increased use of direct listings, we acknowledge that the ability to raise capital in connection with a direct listing may lead more issuers to pursue this alternative method of becoming publicly traded.

With respect to the commenter's concern that Nasdaq's proposal could lead to a decline in effective corporate governance,⁸⁷ the commenter suggests that the involvement of banks and underwriters in conventional IPOs may help investors encourage issuers to revise corporate governance arrangements, such as dual-class structures, that are not favored by such investors. The commenter cited as an example a recent secondary direct listing in which founders of the listed company, as a result of the company's multi-class structure, would retain effective voting

⁸⁵ See, e.g., Pirani v. Slack Techs., Inc., 2020 U.S. Dist. LEXIS 70177 (N.D. Cal., April 21, 2020) (addressing Securities Act Section 11 standing and stating that "[i]f the text is ambiguous, the Court 'may [also] use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent.'" (quoting Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser, 945 F.3d 1076 (9th Cir. 2019))).

⁸⁶ For example, the Ninth Circuit Court of Appeals has agreed to consider the issue of Section 11 standing at issue in Pirani v. Slack Techs., Inc., 2020 U.S. Dist. LEXIS 70177 (N.D. Cal., April 21, 2020) on an interlocutory basis. See Pirani v. Slack Technologies, Inc., No. 20-16419 (9th Cir., July 23, 2020), Docket No. 1.

⁸⁷ See supra notes 75–77 and accompanying text.

control over the company as long as they collectively owned a specified minimum amount of the company's shares. Under existing listing rules, nothing precludes companies with multi-class structures that give their founders disproportionate voting rights from listing on an exchange in connection with a traditional firm commitment IPO; indeed, such listings are not uncommon. Moreover, the Commission does not believe that investors will be precluded from raising concerns about governance structures in the context of direct listings; to the extent a company's corporate governance structures are of sufficient concern to investors, they may be able to influence companies' governance practices, notwithstanding the lack of a firm commitment underwriting, through signaling their unwillingness to purchase a company's shares through a direct listing. In this way, investors may be able to persuade companies to adopt preferred governance provisions, whether the company becomes listed through a direct listing or a firm commitment IPO.

The Commission finds that the proposed rule change is consistent with the protection of investors. The proposed rule change will require all Direct Listings with a Capital Raise to be registered under the Securities Act, and thus subject to the existing liability and disclosure framework under the Securities Act for registered offerings. Among other disclosures, these registration statements will require both bona fide price ranges⁸⁸ and audited financial statements prepared in accordance with either U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board.⁸⁹

The Commission further believes that Direct Listings with a Capital Raise will provide benefits to existing and potential investors relative to firm commitment underwritten offerings.⁹⁰ First, because the securities to be issued by the company in connection with a Direct Listing with a Capital Raise would be allocated based on matching buy and sell orders, in accordance with the

⁸⁸ See, e.g., Instruction 1 to Item 501(b)(3) of Regulation S-K.

⁸⁹ See Rule 4-01(a) of Regulation S-X.

⁹⁰ See also NYSE 2020 Order, *supra* note 47, 85 FR 85816.

proposed rules, some investors may be able to purchase securities in a Direct Listing with a Capital Raise who might not otherwise receive an initial allocation in a firm commitment underwritten offering. The proposed rule change therefore has the potential to broaden the scope of investors that are able to purchase securities in an initial public offering, at the initial public offering price, rather than in aftermarket trading.

Second, because the price of securities issued by the company in a Direct Listing with a Capital Raise will be determined based on market interest and the matching of buy and sell orders, Direct Listings with a Capital Raise will provide an alternative way to price securities offerings that may allow for efficiencies in IPO pricing and allocation.⁹¹ In a firm commitment underwritten offering, the offering price is informed by underwriter engagement with potential investors to gauge interest in the offering, but ultimately decided through negotiations between the issuer and the underwriters for the offering. The underwriters then sell the securities to the initial purchasers at the public offering price. When the securities begin trading on the listing exchange, however, the price often varies from the IPO price. The opening auction in a Direct Listing with a Capital Raise provides for a different price discovery method for IPOs which may reduce the spread between the IPO price and subsequent market trades, a potential benefit to existing and potential investors. In this way, the proposed rule change may result in additional investment opportunities while providing companies more options for becoming publicly traded.⁹²

⁹¹ A frequent academic observation of traditional firm commitment underwritten offerings is that the IPO price, established through negotiation between the underwriters and the issuer, is often lower than the price that the issuer could have obtained for the securities, based on a comparison of the IPO price to the closing price on the first day of trading. See, e.g., Patrick M. Corrigan, Article: The Seller's Curse and the Underwriter's Pricing Pivot: A Behavioral Theory of IPO Pricing, 13 Va. L. & Bus. Rev. 335; Jay R. Ritter, Initial Public Offerings: Underpricing tbl.1 (December 29, 2020), available at <https://site.warrington.ufl.edu/ritter/files/IPOs-Underpricing.pdf>.

⁹² While the Commission acknowledges the possibility that some companies may pursue a Direct Listing with a Capital Raise instead of a traditional IPO, these two listing methods may not be substitutable in a wide variety of instances. For example, some issuers may

The Commission finds that the Exchange's proposal will facilitate the orderly distribution and trading of shares, which promotes fair and orderly markets, and helps the Exchange ensure that its rules prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade and protect investors and the public interest.⁹³ The proposal also will foster competition by providing an alternative method for companies of sufficient size that decide they would rather not conduct a firm commitment underwritten offering to list on the Exchange, thereby removing potential impediments to free and open markets consistent with Section 6(b)(5) of the Exchange Act while also supporting capital formation. For the reasons discussed above, the Commission finds that, on balance, the proposed rule change to permit Direct Listings with a Capital Raise is consistent with the Exchange Act.

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.

require the assistance of underwriters to develop a broad investor base sufficient to support a liquid trading market; others may believe a traditional firm commitment IPO is preferable given the benefits to brand recognition that can result from roadshows and other marketing efforts that often accompany such offerings. Thus, we do not anticipate that all companies that are eligible to go public through a Direct Listing with a Capital Raise will choose to do so; the method chosen will depend on each issuer's unique characteristics.

⁹³ See 15 U.S.C. 78f(b)(5). See also 15 U.S.C. 78k-1(a)(1)(C)(i).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,⁹⁴ that the proposed rule change (SR-NASDAQ-2020-057), as modified by Amendment No. 2 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁵

J. Matthew DeLesDernier,
Assistant Secretary.

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⁹⁴ 15 U.S.C. 78s(b)(2).

⁹⁵ 17 CFR 200.30-3(a)(12).